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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 554

EUREKA LODGE No. 5 INDEPENDENT ELKS (now Eureka Lodge Modern Elks), JERRY O. GILLIAM, and WALTER C. FULFORD,
Petitioners,

v.

GRAND LODGE, IMPROVED, BENEVOLENT, PROTECTIVE ORDER OF ELKS OF THE WORLD,
Respondent.

PETITION FOR WRIT OF CERTOIRARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH DISTRICT.

JAS. G. MARTIN, of Norfolk, Va.,
E. S. PETERS, of Norfolk, Va.,
Counsel for Petitioners.

THE RELIANCE PRESS OF NORFOLK, VA., INC.

Supreme Court of the United States

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GRAND LODGE, IMPROVED, BENEVOLENT, PROTECTIVE ORDER OF ELKS OF THE WORLD,
Respondent.

To the Supreme Court of the United States:

The petition of Eureka Lodge No. 5 Independent Elks (now Eureka Lodge Modern Elks), Jerry O. Gilliam, and Walter C. Fulford shows to this honorable Court as follows, to-wit:

1. The above entitled cause was a civil action in the nature of a suit in equity for injunction, brought in the District Court of the United States for the Eastern District of Virginia at Norfolk, against petitioners by respondent, the chief object of which was to enjoin petitioners from the use in the name of their lodge or otherwise of the word "Elks". The District Court

permitted petitioners to use the word "Elks", if so used as not to confuse it with respondent.

Respondent appealed to the Circuit Court of Appeals for the Fourth Circuit and that court on August 17, 1940, modified the decision of the District Court so as to enjoin petitioners from using the word "Elks", and the matter involved is whether petitioners may use the word "Elks". 114 Fed. (2d), 46.

The opinion of the Circuit Court of Appeals held:

"For the reasons stated, the decree appealed from should be modified so as to forbid defendants' using the word "Elks" in their corporate name, or upon their stationery or literature, and to forbid their using the ritual, emblems, insignia or other paraphernalia of plaintiff order."

2. Petitioners claim that this Court has jurisdiction to review the decree on the basis of Rule 38, Section 5, giving this Court the discretion for review where there are special and important reasons therefor, and Section 240(a) of the Act of February 13, 1925.

Petitioners claim that the question of whether or not they may use the word "Elks" is of great importance to them, and of great importance to vast numbers of other persons in the United States calling themselves "Elks", and to other organizations and businesses.

The reasons relied on for the allowance of the writ are the claims of petitioners that the matter is important to themselves and many others, as above stated, and should be settled by the highest Court.

The Findings of Fact and Conclusions of Law in the District Court were as follows:

FINDINGS OF FACT

1. The plaintiff is a New Jersey corporation, chartered in 1906. The defendant corporation is a Virginia corporation, chartered in 1913, and the individual defendants are citizens of and residents of the State of Virginia, and the Court has jurisdiction because of diverse citizenship, and the amount involved exceeds $3,000.00, exclusive of interest and costs.

2. The Eureka club or association was formed and named in the City of Norfolk, about 1897, before there was any organization of colored persons calling themselves "Elks" anywhere, so far as the evidence discloses. In 1899, this Eureka club was named "Eureka Lodge No. 5, Benevolent, Protective Order of Elks of the World," and associated with what was called "The Grand Lodge Benevolent, Protective Order of Elks of the World".

"Eureka Lodge" has continued as a lodge, actively engaged in fraternal, beneficial and charitable affairs, and now has an active membership of more than four hundred colored men in good standing, and owns valuable property in the City of Norfolk, Virginia. Eureka was a voluntary association until it obtained a corporate charter in the State of Virginia in 1907, which corporate charter thereafter lapsed for failure to pay the franchise tax and registration fee. Another corporate charter was obtained from the State of Virginia in 1913, which continues in force to date, except that after relations were severed in 1939, between Eureka Lodge and plaintiff, Eureka had its corporate charter amended by the State of Virginia, so as to change its name and make its amended name "Eureka Lodge No. 5, Independent

Elks", claiming that this amended name showed it was no longer connected with the plaintiff. Eureka's work is local in the City of Norfolk.

3. Some time prior to 1939 a controversy arose between the plaintiff and defendants, concerning the number of members of Eureka Lodge, and also with respect to a deputy grand master, designated by the Grand Lodge, to have supervision over the district in which Eureka Lodge is located. The defendants contended and still contend that the deputy so designated was an unfit and improper person to occupy the position of deputy. On the other hand, the plaintiff and the grand master contended and still contend that the deputy designated was a fit and proper person to be deputy and that the real reason for defendant's objecting to him as deputy was that the deputy insisted on making an examination of the records and roll of members of Eureka Lodge and, upon such examination, ascertained that Eureka Lodge was paying head taxes to the Grand Lodge on a much smaller number of members than Eureka Lodge actually had. Eureka Lodge refused to pay taxes on the number of members reported by the deputy.

As a result of the controversy the connection of Eureka Lodge and the other defendants with the Grand Lodge was definitely severed and discontinued in the summer of 1939. The plaintiff claims that Eureka Lodge was expelled by the Grand Lodge, while the defendants contend that Eureka Lodge withdrew from the Grand Lodge because of the appointment of said deputy and other actions of the Grand Lodge and its officers, with which defendants were very much dis-

satisfied. It is not necessary to a decision of the case for the Court to determine which of these contentions is more nearly correct.

The Court does find, however, as a fact, that about August 1939, all connection and affiliation of Eureka Lodge with the plaintiff, Grand Lodge, definitely ceased and terminated and has not been renewed.

Following the discontinuance of the affiliation of Eureka Lodge with the Grand Lodge, defendants and others associated with them, obtained an amendment to the charter of Eureka, changing its name from "Eureka Lodge No. 5, Benevolent, Protective Order of Elks of the World" to "Eureka Lodge No. 5, Independent Elks". This new name, when considered along with the letter-heads, literature, emblem and symbols, used by defendants, was misleading and confusing and tended to deceive and mislead the public into believing that defendant lodge was still affiliated with the Grand Lodge. Until some time in November 1939, the defendant lodge used letter-heads that were identical with those it had been using before the separation. These letter-heads carried in its entirety the old name of defendants. The emblem printed on the new letter-heads was identical with that on the old, except a slight difference in the color, due entirely to difference in the density of the printer's ink. The emblem on each letterhead was the most attractive part thereof and naturally the first part to catch the eye of anyone investigating. The new name of the defendants carried "No. 5", although defendant was not after the separation associated or affiliated with any other lodge of Elks, independent, or otherwise. The defendants did not after the separation exercise care to prevent confusion.

Upon application, without notice, the Court granted a temporary restraining order, restraining the defendants from continuing these misleading practices and using the confusing literature and the new name. After an extended hearing on a motion to dissolve the temporary order, the Court refused to dissolve the same and granted a temporary injunction, which remained in force.

LUTHER B. WAY,

March 1, 1940. *United States District Judge.*

CONCLUSIONS OF LAW

1. The defendants should be permanently enjoined from using the name "Eureka Lodge No. 5, Independent Elks", or any other name so similar to the name of the plaintiff organization, which standing alone or in conjunction with other writings or symbols, has a tendency reasonably to mislead or deceive the public into believing that the defendant organization is a subordinate lodge of or is connected with plaintiff. The plaintiff does not possess the right to the exclusion of defendants to use the word "Elks". The defendants also have a right to use the word "Elks" or "Eureka Lodge", or all of these words, as parts of the name in connection with their fraternal activities, provided that in so doing defendants use every reasonable effort to prevent confusion as to the two fraternal orders; that is to say, these words, if and when used by defendants, must be so described, modified or limited by other appropriate words and symbols as to avoid any reasonable conclusion by the public or prospective members that

the defendant organization is connected or affiliated with plaintiff.

LUTHER B. WAY,
United States District Judge.

Norfolk, Virginia,
March 1st, 1940.

Petitioners claim that the following authorities go far towards showing their right to use the word 'Elks".

Benevolent and Protective Order of Elks v. *Improved Benevolent and Protective Order of Elks of the World,* 205 N. Y. 459, 98 N. E. 756, says, in part:

"The *case would be quite different* if the members of the defendant organization had ever been members of the plaintiff corporation and had seceded because of dissatisfaction with its methods of administration or for any other good and sufficient reason. In that event, the representation that the members of the defendant were Elks or had been Elks would be true as a matter of fact, and the use of the parent name as a part of the name of the new society formed by members of the original organization as an offshoot thereof has sometimes been sanctioned. See Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias, 113 Mich. 133, 71 N. W. 470, 38 L.R.A. 658."

The New Jersey case of *State Council of Junior Order of United American Mechanics of New Jersey* v. *National Council of Junior Order of United American Mechanics of North America,* 64 Atl. 561, *is a powerful decision.*

In that case, *the State Council, plaintiff*, which had seceded or been expelled, *enjoined the National Council, defendant,* from setting up in the State of New Jersey, a council with the name of plaintiff.

In that case the Court said, pages 564-5, after saying that plaintiff was justified in withdrawing and not paying the tax imposed by the national council; "Be that as it may, it is quite clear, and both parties agree, that in fact and law all relations between the parties have been fully and completely severed. The defendant says: 'We expelled you'. The complainant says: 'We seceded, and withdrew our allegiance from you'. We have now to inquire what was the effect of this withdrawal and expulsion."

And after showing that even in the Civil War, or War between the States, the United States "never did attempt to destroy the entity of the individual states" (page 567), concludes in part, page 573:

"Such severance did not alter the inherent character of complainant's existence or prevent it from altering the details of its constitution to suit it to an independent existence."

Petitioners respectfully pray that a writ of certiorari be issued out of, and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and send to this Court a full and complete transcript of the record and all the proceedings in this case, to the end that the same may be reviewed and determined by this Honorable Court. And petitioners further pray that the decree of said Circuit

Court of Appeals may be reversed and petitioners permitted to use the word "Elks"; that the mandate of the Circuit Court of Appeals may be stayed until this case is finally decided; and that petitioners may be granted such other and further relief as may seem meet and just.

JAS. G. MARTIN,
Counsel for Petitioners.

E. S. PETERS,
Of Counsel for Petitioners.

STATE OF VIRGINIA,
CITY OF NORFOLK, to-wit:

Before me, the undersigned Notary Public in the City of Norfolk, in the State of Virginia, this day personally appeared Jas. G. Martin, who being duly sworn, deposes and says that he is a member of the bar of the Supreme Court of the United States, and that he is of counsel for petitioners herein; that he has read the

foregoing application for the writ of certiorari, and that all the facts therein stated are true to the best of his belief.

JAS. G. MARTIN.

Subscribed and sworn to before me this 2nd day of November, 1940.

VIRGINIA P. MISTER,
Notary Public.

My commission expires on the 1st day of September, 1942.